

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 19 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOYCELYN J. MANNING, aka Joycelyn
Jo,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 05-76578

Agency No. A37-627-535

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 14, 2008
San Francisco, California

Before: CANBY and M. SMITH, Circuit Judges, and LARSON,** District Judge.

Petitioner Joycelyn Manning challenges a final order of removal, which
found her removable on the basis that her conviction was an aggravated felony

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Stephen G. Larson, United States District Judge for
the Central District of California, sitting by designation.

under 8 U.S.C. § 1101(a)(43)(M)(i) as an offense that involved fraud or deceit in which the loss to the victim or victims exceeded \$10,000.

We have jurisdiction to consider issues of law under 8 U.S.C. § 1252(a)(D); *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1053 (9th Cir. 2006). We review de novo whether a crime is an aggravated felony. *Kharana v. Gonzales*, 487 F.3d 1280, 1283 (9th Cir. 2007). We review the BIA’s decision because it conducted an independent review of the record. *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003). As the parties are familiar with the facts and procedural history of this case, we do not recite them here, except as necessary to explain our decision.

To determine whether a crime is an aggravated felony, we “compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43).” *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002) (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)). Manning was convicted of violating Nevada Revised Statutes (NRS) § 205.463.¹ This statute is a divisible statute whereby a person can violate it by knowingly obtaining and using personal identifying information (1) to harm another person or (2) for any unlawful purpose. *See, e.g., Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir. 2005). Because

¹ We interpret NRS § 205.463 as it existed in 2004, at the time of Manning’s conviction.

obtaining and using personal information to harm another person does not require fraud or deceit, the crime is not categorically an aggravated felony.

If a state statute is “categorically broader than the generic definition of a crime,” we apply the modified categorical approach and look to certain documents underlying the conviction to determine whether the alien’s conviction under that statute qualifies as a conviction of the generic crime, here an aggravated felony.

See Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc).

Here, the documents of conviction do not “unequivocally establish that the defendant pleaded guilty to all elements of the generic offense.” *Li v. Ashcroft*, 389 F.3d 892, 896 n.7 (9th Cir. 2004). The guilty plea stated that Manning pleaded guilty to Counts 1 & 2 “as more fully alleged in the charging document.” The indictment described her intent in the disjunctive, “to harm said person *or* for any unlawful purpose” (emphasis added), and was not an admission of an intent to defraud or deceive. The facts pleaded and the plea colloquy established that she made unauthorized transfers but failed to establish that the transfers necessarily involved fraud or deceit.

Furthermore, the BIA erred in relying on the Presentence Report (PSR) for additional facts that established that Manning fraudulently transferred these funds into her own account. A PSR is not a document of conviction that may properly be

considered as part of a modified categorical analysis. *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006). Though the Amended Guilty Plea Agreement stated that the parties agreed to use the PSR dated February 24, 2004, it did not state that the parties agreed to use this document to provide a factual basis for the plea. Without such a statement, we decline to conclude that the parties meant to use the PSR for more than its routine use in sentencing.

Because the documents of conviction do not unequivocally establish that Manning pleaded guilty to every element of the generic crime as defined in 8 U.S.C. § 1101(a)(43)(M)(i), we grant the petition for review.

We **GRANT** the petition for review, **VACATE** the order of removal, and **REMAND** the matter to the BIA for proceedings consistent with this disposition.